

Sarjit Singh Khaira v State Public Service Commission

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HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG-26 OF 1990

LAU BEE LAN J

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4 JUNE 2007

Civil Procedure — Costs — Review of Registrar's Certificate — Whether Registrar had erred in allowing the applicant's Bill of Costs — Factors for consideration

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Civil Procedure — Costs — Interest on costs — Whether the learned Deputy Registrar had exercised her discretion judiciously in not awarding interest

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The applicant and the respondent both sought a review of the applicant's Bill of Costs (encl 170) which was taxed before the learned Deputy Registrar vide certificate dated 13 June 2005 pursuant to O 59 r 36(1) of the Rules of the High Court 1980. Prior to the filing of the review, the learned Deputy Registrar having heard the taxation, allowed the applicant's Bill of Costs made on 'a party and party' basis for the amount of RM 235,814.56 (inclusive of allocatur fee). The respondent being dissatisfied, applied for a review of the said Bill of Costs before the learned Deputy Registrar which was subsequently dismissed, wherein the Bill of Costs given on 13 January 2005 was maintained with no interest on the costs. The Applicant then filed this application for review with respect to interest whilst the Respondent object was basically to item 119 of the Bill of Costs. At the hearing of this review, respondent submitted inter alia that (a) item 119 of the Bill of Costs which included getting-up costs for the inquiry (item 1) ought not to be considered as the inquiry was not a matter within the jurisdiction of the Court. Thus, paragraphs 1 to 14 of the chronology of events (Appendix (A)) were completely irrelevant; (b) exh A1 is about Kuching High Court originating motion No KG. 4 of 1989 which relates to amendment and the applicant's counsel's submission was speculative; and (c) the power to award or refuse interest is one of pure discretion. The respondent also argued that the fact that Mr. Steve Shim (as he then was) was at the material time a sessions court judge did not change the character of the proceedings in that it was not before a judge but it was presided by the former sitting in his capacity as Chairman of the Board of Inquiry.

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Held, dismissing the applications with no order as to costs:

- (1) The applicant would not be entitled to costs before the Board of Inquiry as costs awarded in the High Court must be in relation to the proceedings in the High Court. Hence to this extent, the learned Deputy Registrar erred when she stated that the applicant is entitled to 'getting up for the Inquiry' (*Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 followed) (see para 9).

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- A (2) Although it would have been ideal if a time sheet or 'attendance-slips' were kept, a time sheet is not compulsory and the fact that no time-sheet was prepared does not detract from the fact that time was spent on getting up for the various actions which have been itemised above as can be gleaned from the chronology of events which the learned Deputy Registrar had given due regard thereto (see para 13).
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- C (3) The learned Deputy Registrar did not err when she considered that there were many complicated issues of both facts and law involving extensive legal research and stated that the complexity of the matter was confirmed by the Deputy State Attorney -General as per his letter dated 28 March 1989 contained in exh A1 to the notice of taxation. Although the case no. cited in exh A1 was not the same suit but it was inter-connected with the present application for an order of certiorari (see para 14).
- D (4) By virtue of the letter dated 22 May 2003 addressed to Mr T.O Thomas by the applicant complaining that the former was incompetent and had been negligent in not filing the notice of taxation for eight years, any award of interest would condone such complaint. The learned Deputy Registrar had thus exercised her discretion judiciously in not awarding interest (see para 16).

[Bahasa Malaysia summary]

- E Pemohon dan responden kedua-duanya telah memohon untuk satu kajian semula Bil kos pemohon (Lamp 170) yang mana telah ditaksirkan di hadapan Timbalan Pendaftar melalui Sijil bertarikh 13 Jun 2005 menurut kepada A 59 k36(1) Kaedah-kaedah Mahkamah Tinggi 1980. Sebelum pemfailan kajian semula,
- F Timbalan Pendaftar setelah mendengar taksiran, membenarkan Bil Taksiran pemohon dibuat atas dasar 'pihak dan pihak' untuk jumlah RM235,814.56 (termasuk yuran alokatur). Responden yang tidak berpuas hati, memohon untuk satu kajian semula Bil Kos tersebut di hadapan Timbalan Pendaftar yang kemudiannya telah ditolak, di mana Bil Kos yang diberikan pada 13 Januari 2005 dikekalkan
- G dengan tiada faedah ke atas kos. Pemohon kemudiannya memfailkan permohonan ini untuk kajian semula berkenaan faedah sementara tujuan responden pada asasnya untuk item 119 Bil Kos. Semasa pendengaran kajian semula ini, responden menghujahkan antara lain bahawa (1) item 119 Bil Kos yang memasukkan penyediaan guaman untuk siasatan (item 1) hendaklah tidak dipertimbangkan memandangkan siasatan bukanlah perkara dalam bidang kuasa mahkamah.
- H Oleh yang demikian, perenggan-perenggan 1-14 Kronologi Peristiwa-peristiwa (Lampiran (A) adalah tidak relevan sepenuhnya; (b) eks A1 adalah mengenai Mahkamah Tinggi Kuching Usul Pemula No KG. 4 tahun 1989 yang mengaitkan kepada pindaan dan hujahan peguamcara pemohon adalah spekulatif; dan (c) kuasa untuk mengawardkan atau menolak faedah adalah satu daripada budibicara tulen.
- I Responden juga mempertikaikan bahawa fakta En Steve Shim (pada masa itu) adalah pada setiap masa material adalah Hakim Mahkamah Sesyen tidak mengubah hala tuju dalam prosiding kerana ia bukannya di hadapan hakim tetapi telah dipengerusikan oleh persidangan terdahulu dalam kapasitinya sebagai Pengerusi Lembaga Siasatan.

Diputuskan, menolak permohonan dengan tiada perintah mengenai kos:

- (1) Pemohon tidak berhak kepada kos di hadapan Lembaga Siasatan memandangkannya kos yang diawardkan oleh Mahkamah Tinggi adalah berkaitan dengan prosiding dalam Mahkamah Tinggi. Oleh kerana itu sehingga ke tahap ini, Timbalan Pendaftar yang terpelajar telah khilaf bila beliau mengatakan pemohon berhak kepada 'penyediaan guaman untuk siasatan' (*Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 diikuti) (lihat perenggan 9).
- (2) Walaupun ia adalah sangat ideal jika helaian masa atau 'slip-slip kehadiran' disimpan, helaian masa adalah tidak wajib dan fakta bahawa tiada helaian masa disediakan tidak akan mengurangkan daripada fakta bahawa masa yang diluankan dalam penyediaan guaman untuk pelbagai tindakan-tindakan yang telah diperincikan di atas boleh dikumpulkan daripada kronologi peristiwa-peristiwa di mana Timbalan Pendaftar yang terpelajar telahpun memberikan perhatian sewajarnya (lihat perenggan 13).
- (3) Timbalan Pendaftar yang terpelajar tidak khilaf bila beliau menimbangkan bahawa terdapat isu-isu rumit dalam kedua-dua fakta dan perundangan melibatkan penyelidikan perundangan yang menyeluruh dan mengatakan bahawa kerumitan perkara tersebut telah disahkan oleh Timbalan Peguam Kanan Negeri sebagaimana suratnya bertarikh 28 Mac 1989 yang terkandung dalam eks A1 kepada Notis Taksiran. Walaupun nombor kes telah dinyatakan dalam eks A1 adalah tidak sama dengan guaman tetapi ia adalah bersangkut-paut dengan permohonan sekarang untuk perintah certiorari (lihat perenggan 14).
- (4) Oleh sebab surat bertarikh 22 Mei 2003 dialamatkan kepada En T.O Thomas oleh pemohon mengadu bahawa yang terdahulu adalah tidak berkemampuan dan telah cuai kerana tidak memfailkan Notis Taksiran untuk selama 8 tahun, sebarang award bagi faedah akan membiarkan begitu sahaja aduan tersebut. Timbalan Pendaftar yang terpelajar adalah dengan itu telah mengamalkan budi bicaranya secara bijak kerana tidak mengawardkan sebarang faedah (lihat perenggan 16).]

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Notes

For cases on review of registrar's certificate, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1846-1849.

For cases on interest on costs, see 2(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1777-1778.

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Cases referred to

Chin Shui Lan v Liow Yuan Kung @ Herman and 4 Ors O S No. T(24) of 16 of 1995, High Court in Sabah and Sarawak at Tawau (Unreported) (refd)

Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd [1999] 2 MLJ 374 (refd)

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Lian Kim Lian v Bajuria [1971] 1 MLJ 276 (refd)

MC Corbett v Ipoh Tin Dredging Ltd [1936] 1 MLJ 222 (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn. Bhd [1999] 3 MLJ 489 (refd)

- A *Raja Abdullah Wahman Raja Sulaiman & Anor v Toplink Technologies Sdn Bhd* [2003] 5 CLJ 263 (refd)
SM.O Othaman Chettiar v Ang Gee Bok [1971] 1 MLJ (refd)
Starlite Ceramic Industry Ltd v Hiap Huat Pottery [1973] 1 MLJ 146 (refd)
Union Insurance Malaysia Sdn Bhd v Chan You Young [2003] 7 CLJ 50 (refd)

- B **Legislation referred to**
Rules of the High Court 1980 O 59 r 36(1)
Alvin Yong (Tan Yap & Tang) for the respondent.
Shankar Ram (Thomas Shankar Ram & Co) for the applicant.

- C **Lau Bee Lan J:**

- D [1] This is both the applicant's review (encl 175) and the respondent's review of the applicant's Bill of Costs (encl 170) taxed before the learned Deputy Registrar vide Certificate dated 13 June 2005 (encl 167) pursuant to O 59 r 36(1) of the Rules of the High Court 1980('the RHC').

- E [2] The learned Deputy Registrar heard the taxation on the applicant's Bill of Costs made on 'a party and party' basis and on 13 January 2005 allowed the applicant's Bill of Costs dated 22 September 2004 (encl 136) for the amount of RM235,814.56 (inclusive of allocatur fee). The respondent being dissatisfied applied for a review of the said Bill of Costs before the learned Deputy Registrar which was dismissed, i.e. the Bill of Costs given on 13 January 2005 was maintained with no interest on the costs. Hence, the application for review by the applicant with respect to interest whilst the respondent object basically to item 119 of the Bill of Costs.

- G [3] Basically the premise upon which the Court will interfere with the decision of the taxing registrar is if it can be clearly shown that in the exercise of his discretion to award the costs, the taxing registrar has made an obvious mistake or has exercised his discretion capriciously or mischievously or there are some error of principles (see *Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 7 CLJ 50, *MC Corbett v Ipoh Tin Dredging Ltd* [1936] 1 MLJ 222, *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146, *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374, *Chin Shui Lan v Liow Yuan Kung @ Herman and 4 Ors. O.S No. T(24) of 16 of 1995, High Court in Sabah and Sarawak at Tawau (Unreported)*)

- H [4] The first ground of objection of the respondent is with respect to item 119 of the Bill of Costs which included getting-up costs for the inquiry (item 1) which the respondent submitted ought not to be considered as the Inquiry is not a matter within the jurisdiction of the Court and thus paragraphs 1 to 14 of the Chronology of Events (Appendix (A)) are completely irrelevant.

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[5] On the first ground, the learned Deputy Registrar's ruling is:

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Item 1 of the Bill of Costs includes the Applicant's attendance before the Board of Inquiry on the various dates stated therein. Paragraphs 1 to 14 of 'Appendix A' states the Chronology of Events that took place.

Learned counsel for the applicant submit that his client is entitled to the costs because the Applicant was dismissed from service by the Respondent and the Respondent as the State Public Service Commission (PSC) knew from the beginning that they were a party to the proceedings and that the Applicant is entitled to the costs in view of the High Court order which was affirmed by the Court of Appeal and by the Supreme Court.

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Having considered the submission by the learned counsel for the Applicant and the Respondent, I am of the view that the Applicant is indeed entitled to the costs of the getting up in item 119 which includes the getting up for the Inquiry. The reasons being that in the hearing for an order of certiorari in High Court Kuching of Kg. 26 of 1990, the High Court ordered that 'the costs of and occasioned by this application of the Applicant be borne by the State Public Commission to the credit of Sarjit Singh Khaira (SSK) to be taxed unless Agreed'. The Court of Appeal has affirmed the judgment of Kuching High Court, dismissed the appeal of the PSC with costs and again at the Supreme Court level, the appeal by PSC was dismissed and awarded costs in favour of SSK to the account of his taxed costs.

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I am agreeable with the learned counsel for the Applicant in our present case that the order of costs goes back to the inception of the matter i.e. that the Notice of Motion prayed for an order of certiorari to quash the decision of State PSC made on 14th day of December 1988 ordering that the applicant be dismissed from the State Public Service as an Accounting Officer with effect from 1st January 1989

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[6] I am persuaded by the learned Counsel for the respondent's argument that the fact that Mr. Steve Shim (as he then was) was at the material time a Sessions Court Judge does not change the character of the proceedings in that it was not before a judge but it was presided by the former sitting in his capacity as Chairman of the Board of Inquiry.

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[7] To bolster his argument, learned Counsel for the respondent cited the case of Damansara Jaya Sdn Bhd. In this case, (as per the headnotes), one of the respondent company's land had been compulsorily acquired by the Federal Government and compensation was made resulting in a gain over the purchase price of RM18,299,665. The Director-General of Inland Revenue ('the DG') treated the amount as income and made an additional assessment against the company amounting to RM8,576,067.95 ('the sum'). The company appealed to the Special Commissioners, who allowed the appeal. At the request of the DG, the case was stated to the High Court for review. Pending the appeal, the company secured a bank guarantee which was given to the DG in lieu of payment of the additional tax. The High Court, subsequently, dismissed the appeal with costs. The bill of costs was taxed by the senior assistant registrar ('the SAR') who, inter alia, awarded RM40,000 as getting-up fee to the company and allowed the claim of RM820,849.51 as fees paid to the bank for securing the bank guarantee. The DG and the company were dissatisfied with the getting-up fee and applied for a review. The DG also objected to the amount allowed in respect of the bank guarantee.

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A [8] With regard to the review on the issue of the Senior Assistant Registrar allowing the award of RM820,849.51 as reimbursement of the fees incurred for securing a bank guarantee, His Lordship K.C Vohrah J (as he then was) held that the SAR erred. In his judgment, the learned judge held at p 383 G to I:

B It will be noted that statutorily, the Special Commissioners have no power to award costs after deciding on the appeal. The costs awarded by the High Court must, therefore, be in relation to the proceedings in the High Court, not in relation to the proceedings before the Special Commissioners. The fact that an appeal had been pursued before the High Court cannot bring into existence for the winning party as a right, what could not be claimed as a right before the Special Commissioners, even assuming that the DG had power to allow for a bank guarantee to be given to secure payment of the additional tax. In any event, the
C DG has no such power. The DG has power if the full amount of the tax is not paid in one lump sum to allow partial payments until the whole amount is paid, and the partial payments may be made on such dates as he may determine. A bank guarantee is certainly not an instalment payment, let alone a payment. The DG in this case, had granted the company an indulgence not sanctioned by the Act

D [9] Similarly in the present case, following the judgment of K.C Vohrah J (as he then was) in Damansara Jaya Sdn Bhd with which I agree, it means that the applicant would not be entitled to costs before the Board of Inquiry as costs awarded in the High Court must be in relation to the proceedings in the High Court. Hence to this extent, I am of the view that the learned Deputy Registrar erred when she stated that
E the applicant is entitled to 'getting up for the Inquiry', since the 'order of costs goes back to the inception of the matter i.e, that the Notice of Motion for an order of certiorari to quash the decision of the PSC made on 14th day of December 1988 ordering that the applicant be dismissed from the State Public Service as an Accounting Officer with effect from 1st January 1989'.
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[10] It is to be observed that the Notes of Proceedings before the Board of Inquiry consisted of 64 pages covering over a 12 day period of sitting; the prosecution filed more than 29 exhibits and made 24 pages written submissions and a reply whilst the defendants filed more than 145 exhs and 16 pages of written submission and a reply.

G [11] Thereafter followed the various actions comprising:

- (i) OM KG. 16 of 1989 - for leave to apply for an Order of Certiorari to quash the decision of the Public Service Commission was filed on 4 February 1989; leave granted; costs in the cause.
- H (ii) OS KG. 275 of 1989 - application for extension of time for the same as (i) above filed on 8 December 1989; extension granted; costs be in the cause.
- (iii) OM KG. 26 of 1990 - application for an order of certiorari to quash the decision of the State Public Service Commission made on 14 December 1988 which dismissed the applicant from the State Civil Service w.e.f 1 January 1989, filed on 12 December 1990; after 16 days of hearing, on 7 February 1992 the said motion was dismissed by Dato' Hj Abdul Kadir Sulaiman JC (as he then was) on the sole ground that the State Public Service Commission was not a party to the proceedings; costs were awarded to the Government to be taxed unless agreed but the applicant was successful before the Supreme
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Court which allowed the applicant's appeal and ordered the High Court to continue with the hearing of the substantive motion and that the Notice of Motion be served on the State Public Service Commission.

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- (iv) The continued hearing before the same Honourable JC proceeded between 6 December 1994 to 76 January 1995 (7 days) wherein parties filed numerous detailed affidavits; the Honourable JC on 7 July 1995 decided in favour of the applicant and ordered the costs of and occasioned by this application of the applicant be borne by the State Public Service Commission to the credit of the applicant to be taxed unless agreed.

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- (v) On 16 January 1999, the Court of Appeal affirmed the judgment of the High Court and dismissed the appeal of the State Public Service Commission with costs to be taxed. The applicant submitted 100 hours time was spent in detailed research work and on defending the appeal by the State Public Service Commission.

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- (vi) On 6 July 2000 the Federal Court dismissed the appeal of the State Public Service Commission and awarded costs in favour of the applicant to the account of his taxed costs.

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[12] I find that the learned Deputy Registrar was mindful of the absence of a 'time sheet' which the learned counsel for the defendant mooted had to be kept relying on the case of *Chin Shui Lan v Lio Yuan Kung @ Herman & 4 Ors*, O.S. No. T(24) 16 OF 1995 (Unreported), decision of Ian Chin J who relied on *SM.O Othaman Chettiar v Ang Gee Bok* [1971] 1 MLJ. In *SM.O Othaman Chettiar's* case there was a claim by a moneylender for the repayment of \$4,000 alleged to have been loaned by him to the defendant on the security of a promissory note and agreed interest. The sum of \$400 only was admitted as having been received and it was alleged that this sum was not handed to the defendant in the presence of the solicitor who attested the pro-note at the time of execution. In the cause of the trial, another attorney testified and he could not recall the transaction at all. It was in this context that His Lordship Datuk Chan Min Tart J (as he then was) made the following observation at p 91 D to E:

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Apparently this solicitor did not appreciate the clear advantages of keeping written aide-memoires of attendances on clients and other parties, to which he could make reference by way of refreshing his memory to recall the events of any particular transaction. Attendance-slips as they are usually called in the profession must be seen to be of the utmost importance not only in recalling past events to mind but also for purposes of taxation of costs. It is, I realise, not part of my duty nor should it be my presumption to advise solicitors on how they should or should not carry out their work but I would venture, with some diffidence, to suggest that solicitors would do well to bear in mind the possibility of their being called to the witness stand. In this particular instance, the solicitors not only did not keep any attendance-slip but also did not use the pro-note beyond identifying his signature which was no it, to refresh his memory. He, as I noted, categorically stated that he could not recall anything about this particular transaction

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(Emphasis added)

A [13] In my view, although it would have been ideal if a time sheet or 'attendance-slips' are kept, a time sheet is not compulsory and the fact that no time-sheet was prepared does not detract from the fact that time was spent on getting up for the various actions which I have itemised above as can be gleaned from the chronology of events which the learned Deputy Registrar had given due regard thereto.

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C [14] I find that the learned Deputy Registrar did not err when she considered that there were many complicated issues of both facts and law involving extensive legal research and stated that complexity of the matter was confirmed by the Deputy State Attorney-General as per his letter dated 28 March 1989 (exh A1 to the Notice of Taxation). The learned counsel for the respondent submitted that exh A1 is about Kuching High Court Originating Motion No. KG. 4 of 1989 and related to amendment and the applicant's counsel's submission was speculative. I am in agreement with the counsel for the applicant that although the case No cited in exh A1 is not the same suit but it is inter-connected with the present application for an order of certiorari.

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E [15] The applicant urged the Court grant statutory interest from the date of judgment till full and final settlement and cited the case of *Lian Kim Lian v Bajuria* [1971] 1 MLJ 276 and *Raja Abdullah Wahman Raja Sulaiman & Anor v Toplink Technologies Sdn Bhd* [2003] 5 CLJ 263.

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G [16] In rebuttal, learned counsel for the respondent cited *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 where at p 495 G His Lordship Gopal Sri Ram JCA joined 'It is well settled that the power to award or refuse interest is one of pure discretion'. In this connection I am inclined to agree with submission made on behalf of the respondent that by virtue of the letter dated 22 May 2003 addressed to Mr T.O Thomas by the applicant complaining that the former was incompetent and had been negligent in not filing the Notice of Taxation for eight years and therefore any award of interest would condone such complaint. In the circumstances I find that the learned Deputy Registrar had exercised her discretion judiciously in not awarding interest.

[17] For the foregoing reasons, both the applicants are the respondent's applications for review are dismissed with no order as to costs.

H *The respondents' applications for review are dismissed with no order as to costs.*

Reported by Eugene Daniel Louis

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